UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21

THE BOEING COMPANY

Employer

and Case 21-RD-2693

RICHARD A. TERRACINA, JR., An Individual

Petitioner

and

SOUTHERN CALIFORNIA PROFESSIONAL ENGINEERING ASSOCIATION, OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 90, AFL-CIO[1]

Union

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

[1] The name of the Union appears as amended at the hearing.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.[2]

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees (1) in classifications certified by the National Labor Relations Board; (2) as agreed upon between the Employer and the Union to be represented by the Union; and (3) who are now or hereafter classified in the job classifications set forth in Appendices "A" and "AA," as set forth in the collective-bargaining agreement between the Union and the Employer, which is effective by its terms from March 5, 2001, through March 3, 2005; and who are employed by the Employer at its facilities located at 3855 Lakewood Boulevard, Long Beach, California; 2401 Wardlow Road, Long Beach, California; and 5301 Bolsa Avenue, Huntington Beach, California; and at its operations located at Vandenberg Air Force Base, California; and Cape Canaveral Air Force Station, Florida; excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.[3]

[2] The Petitioner asserts that Southern California Professional Engineering Association, Office and Professional Employees International Union, Local 90, AFL-CIO (herein called the Union) is no longer the bargaining representative of the employees, as defined in Section 9(a) of the Act.

[3] Attached to this Decision and Direction of Election is a true and correct copy of Board Exhibit 2. The parties stipulated that Board Exhibit 2 was the contractual unit, and the appropriate unit for purposes of this proceeding. The job classifications set forth in Appendices "A" and "AA" are listed in the five pages attached to Board Exhibit 2.

I. The Issues

The Union contends that its motion to dismiss the petition should be granted because of the Section 8(a)(1)and(5) unfair labor practice case pending against the Employer in Case 21-CA-33549. The Employer and the RD Petitioner argue that the motion to dismiss the petition should be denied as contrary to Board precedent and untimely.

With regard to the appropriate unit, the Union argues that employees in classifications currently outside the contractual unit should be included in the unit and permitted to vote because they perform the same job functions as unit employees. The Employer and RD Petitioner maintain that only employees in the classifications specifically set forth in the contractual unit can be permitted to vote in a decertification election.

Based on the reasoning set forth below, I am denying the Union's motion to dismiss the petition as contrary to Board precedent and untimely. Accordingly, I shall direct an election in the appropriate unit. I also find, based on the Board precedent noted below, that only employees in the classifications set forth in the contractual unit can be permitted to vote in the decertification election. In this regard, the similarity of job functions between non-unit employees and unit employees is irrelevant as the appropriate unit in a decertification election must be co-extensive with either the certified or recognized bargaining unit.

II. The Union's Motion to Dismiss Petition

The Union contends that its motion to dismiss the petition should be granted because of the Section 8(a)(1) and (5) unfair labor practice case pending against the Employer in Case 21-CA-33549. The Employer and RD Petitioner argue that the motion to dismiss the petition should be denied as contrary to Board precedent and untimely.

The Employer, a Delaware corporation, is engaged in the manufacture of aircraft and aerospace products and the provision of aerospace services. There are approximately 2,393 unit employees at the Employer's two Long Beach facilities; approximately 1,700 unit employees at the Huntington Beach facility; 100 employees at Cape Canaveral; and 41 employees at Vandenberg.

The Employer and the Union have had a collective-bargaining relationship dating from the 1940s through the present. The previous collective-bargaining agreement between the parties was effective from May 1, 1996, through March 4, 2001. The current collective-bargaining agreement between the parties is effective from March 5, 2001, through March 3, 2005.

On October 8, 1999, the Union filed a charge in Case 21-CA-33549 alleging that the Employer violated Section 8(a)(1) and (5) of the Act by unilaterally changing compensation and benefit plans of formerly unrepresented employees who transferred into the Union's bargaining unit. On March 30, 2001, Region 21 issued a Complaint and Notice of Hearing based upon the allegation in the charge. On September 5, 2001, Administrative

Law Judge Lana Parke issued her decision and recommended order, dismissing the complaint(JD(SF)-69-01). The General Counsel did not file exceptions to the Judge's decision. The Union, however, did file exceptions. The case is currently pending before the Board.

Meanwhile, On February 16, 2001, over 16 months after the Union filed the unfair labor practice charge in Case 21-CA-33549, Richard A. Terracina, Jr. filed an RD petition to decertify the Union. On March 23, 2001, Region 21 determined to hold the petition in abeyance due to the pending unfair labor practice charge. After the filing of the petition, the Region received numerous communications from the parties, employees, and members of the public about these matters. Numerous documents were presented to the Region demonstrating a serious rift within the organizational structure of the Union going to, inter alia, the question of who speaks for the Union. Information was provided to the Region regarding significant internal election disputes involving the Union; collateral investigations by other Federal agencies involving internal union matters; and claims that the disputes within the Union may have caused it to cease effectively operating as a viable labor organization and/or that the Union disregards the wishes of its members.

On March 8, 2002, after soliciting and receiving position statements from the parties, I made a determination that the unfair labor practice complaint, which the Judge recommended be dismissed, should not continue to block the petition. Accordingly, I issued an order that the processing of the

petition resume and that a hearing be conducted. The Union's request for review of that determination is currently pending before the Board.

On April 3, 2002, almost 14 months after the petition was filed, the Union, for the first time, filed a motion to dismiss the petition. In its motion, the Union asserts that the petition should have been dismissed upon issuance of the complaint in the unfair labor practice matter on March 30, 2001.

Citing to Douglas-Randall, Inc., 320 NLRB 431 (1995); Liberty Fabrics, Inc., 327 NLRB 38 (1998); Super Shuttle of Orange County, 330 NLRB No. 138 (2000); and BOC Group, Inc., 323 NLRB 110 (1997), the Union argues that Board precedent supports the dismissal of the petition in this case. The Union maintains that the Douglas-Randall line of cases stands for the proposition that unfair-labor-practice conduct that includes a refusal to bargain prior to the filing of a decertification petition, is a basis for dismissing a petition.

To the contrary, the cases that the Union cites are inapposite here. Under Douglas-Randall and its progeny, when an employer enters into a settlement agreement resolving outstanding unfair labor practice charges and complaints by recognizing and bargaining with the union, any decertification petition filed subsequent to the onset of the alleged unlawful conduct will be dismissed. Douglas-Randall involved dismissal of an RD petition following an informal Board settlement that required the Employer to recognize and bargain with the Union; Liberty Fabrics involved dismissal of an RD petition following a non-Board settlement in

which the Employer agreed to recognize and bargain with the Union; and Super Shuttle involved dismissal of a rival union petition following a collective-bargaining agreement, which the Board found was intended by the parties to, and effectively did, resolve the outstanding unfair labor practice charge.

Here, in sharp contrast, there has not been any settlement of the unfair labor practice charge or any agreement that resolves the outstanding unfair labor practice charge. To the contrary, the unfair labor practice charge has been litigated and the Judge has recommended dismissal of the complaint. While the General Counsel elected not to file exceptions, the Union did file exceptions, which are currently pending before the Board. Accordingly, the cited cases provide no basis to dismiss the RD petition here.

Likewise, the Union's reliance on BOC Group is misplaced. In BOC Group, the Board held that the RD petition should be dismissed, subject to reinstatement, because there were allegations pending, which, if proven, may result in a bargaining order and preclude a question concerning representation. The Board also found, however, that a settlement agreement regarding one of the unfair labor practice complaint allegations against the same employer was not a basis for dismissing the petition because the informal Board settlement agreement did not contain a requirement that the employer recognize and bargain with the Union, and the unfair labor practice allegation was not the type of unfair labor practice that would preclude a question concerning representation under Douglas-Randall.

The allegation at issue in BOC Group was a unilateral change from the employer's past practice of compensating employees for attending company meetings. Similarly, the allegation here is a unilateral change in the Employer's compensation and benefit plans for a group of formerly unrepresented employees who transferred into the Union's bargaining unit. In both circumstances, the alleged unilateral change could be remedied by a cease and desist order, a make-whole order, and an order restoring the terms and conditions prior to the unilateral change. An affirmative bargaining order would be unnecessary.

Thus, like the unilateral change allegation in BOC Group, here the Employer's alleged unilateral change in compensation and benefit plans would not be the type of unfair labor practice that would preclude a question concerning representation under Douglas-Randall. Indeed, this is consistent with NLRB Casehandling Manual, Part II Sec. 11730.3(b), which specifically acknowledges that "[r]emedying meritorious allegations of 8(a)(5). . . unilateral change. . . does not necessarily require an affirmative bargaining order. Accordingly, these kinds of charges should be viewed as Type I charges. . . . " Thus, the cases cited by the Union are all readily distinguishable and provide no basis for dismissing the petition here.

Furthermore, the untimely filing of the Union's motion to dismiss the petition highlights its lack of merit. In its motion, the Union asserts that the petition should have been

dismissed upon issuance of the complaint in the unfair labor practice matter on March 30, 2001. If the Union believed that the issuance of complaint required the dismissal of the petition, it should have filed its motion at the time the complaint issued, more than 13 months ago. Instead, the Union requests dismissal now, after the Judge recommended dismissal of the complaint, after the General Counsel declined to file exceptions to the Judge's decision, after the Regional Director decided that the charge should not serve as a block to the election, and after the scheduling of the hearing to resume processing of the petition. Thus, the Union's belated attempt to dismiss the petition further demonstrates the lack of merit of its motion.[4] Accordingly, the Union's motion to dismiss the petition is denied, and I shall direct an election in the appropriate unit.

III. The Appropriate Unit for the Decertification Election

The Union argues that employees in classifications currently outside the contractual unit should be included in the unit and permitted to vote because they perform the same job

[4] Before the complaint issued in Case 21-CA-33549 on March 30, 2001, the Union raised the issue of dismissing the petition in a March 5, 2001 position statement to the Region regarding the blocking of the unfair labor practice charge. The Union, however, did not make any motion to dismiss the petition at that time. Moreover, as the Union concedes in its post-hearing brief in this matter, at no time since the complaint issued on March 30, 2001, until the hearing, has the Union made a motion to dismiss the petition.

functions as unit employees. The Employer and RD Petitioner maintain that only employees in the classifications specifically set forth in the contractual unit can be permitted to vote in the decertification election.

It is well established that the appropriate unit in a decertification election must be coextensive with the certified or recognized unit. Saints Mary and Elizabeth Hospital, 274 NLRB 607 (1985); Brom Machine & Foundry Co., 227 NLRB 690 (1977), enfd. 569 F.2d 1042 (8th Cir. 1978). Hence, community-of-interest factors which would be considered in making an initial appropriate unit determination are irrelevant in a decertification proceeding. Fast Food Merchandisers, Inc., 242 NLRB 8 (1979).

Here, the appropriate unit, which sets forth specific job classifications, is contained in the recognition clause of the parties' collective-bargaining agreement and was stipulated to by the parties at the hearing.[5] Thus, the hearing officer correctly rejected the Union's offer of proof that there were employees in classifications currently outside the contractual unit who perform the same job functions as unit employees, and that these employees should therefore be included in the unit and eligible to vote in the election. The similarity of job functions between employees in classifications outside the

[5] The current collective-bargaining agreement also sets forth a process for conversion of the current job classifications listed in Appendix A and Appendix AA of the collective-bargaining agreement to a salaried job classification system, which conversion was expected to occur by September 2001 (See Joint Exh. 2(a), at Attachment 15). The parties stipulated that these conversions have not yet occurred. Accordingly, future conversions have no bearing on the current contractual bargaining unit.

contractual unit and employees in classifications within the contractual unit is wholly irrelevant to this proceeding. Id.

Accordingly, I shall direct an election in the appropriate unit. There are approximately 4,230 employees in the unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military service of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date, and who have been permanently replaced. Those

eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by **Southern California Professional Engineering Association, Office and Professional Employees International Union, Local 90, AFL-CIO.**

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and the addresses that may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, two copies of an alphabetized election eligibility list, containing the names and addresses of all eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB 359 (1994). In order to be timely filed, such list must be in Region 21, 888 South Figueroa Street, Ninth Floor, Los Angeles, California 90017-5449, on or before May 14, 2002. No extension of time to file the list shall be granted, except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

NOTICE OF POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous

to potential voters for a minimum of 3 working days prior to the date of the election. Failure to file the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by May 21, 2002.

Dated at Los Angeles, California, this 7th day of May, 2002.

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Victoria E. Aguayo
Regional Director
National Labor Relations Board
Region 21

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